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No. 507

In the Supreme Court of the United States

OCTOBER TERM, 1958

SOLOMON P. ROSENBLOOM, ALSO KNOWN AS SOL ROSENBLOOM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals (Pet. 19–27) is reported at 259 F. 2d 500.

JURISDICTION

The judgment of the Court of Appeals was entered on October 15, 1958 (Pet. 27–28), and the petition for a writ of certiorari was filed on November 10, 1958. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support the verdict.

2. Whether the trial court committed plain error in instructing the jury on the element of willfulness.

STATUTES INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * * *

(26 U. S. C. 1952 ed., Sec. 145 (b)).

SEC. 3793. PENALTIES AND FORFEITURES.

* * * * * *

(b) *Fraudulent Returns, Affidavits, and Claims.*—

(1) *Assistance in Preparation or Presentation.*—Any person who willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a false or fraudulent return, affidavit, claim, or document, shall (whether or not such falsity or fraud is with the knowledge

or consent of the person authorized or required to present such return, affidavit, claim, or document) be guilty of a felony, and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 1952 ed., Sec. 3793 (b) (1)).

STATEMENT

On November 14, 1956, petitioner was charged, in a six-count indictment filed in the United States District Court for the Eastern District of Missouri, with willfully attempting to evade a substantial part of his individual income taxes for 1950 and 1951, in violation of Section 145 (b) of the Internal Revenue Code of 1939, and with willfully preparing and filing false and fraudulent partnership returns for the Rosenbloom Monument Company and false and fraudulent individual income tax returns for Louis J. and Bessie Rosenbloom for the same years, in violation of Section 3793 (b) (1) of the Code. (R. 1–4.) The indictment alleged that the reported income compared with the true income as follows (R. 1–4):

	Net income reported	Net income corrected
Solomon Rosenbloom (Petr.):		
1950	$6,114.68	$10,544.30
1951	6,331.82	11,301.72
Rosenbloom Monument Company:		
1950	25,543.83	49,294.88
1951	26,750.21	53,082.00
Louis and Bessie Rosenbloom		
1950	5,885.79	10,289.98
1951	7,174.39	12,212.66

After a jury trial, petitioner was found guilty on all counts. (R. 69.) On June 14, 1957, petitioner was given concurrent prison sentences of eighteen months on each of the six counts and fined $1,250 on each of the first two counts, a total fine of $2,500. (R. 72–74.)

The evidence to support the verdict may be summarized as follows:

During the prosecution years petitioner and four persons related to him were partners in a firm known as the Rosenbloom Monument Company, which engaged in the business of selling stone monuments for erection in cemeteries. (R. 17, 79, 85.) The books of the partnership were kept by petitioner's brother-in-law under the direct supervision of petitioner. (R. 17, 18.) This bookkeeper had been trained in his duties by petitioner, who had taken a nine months course at a business college, and who had been in the monument business for thirty-five years. (R. 17, 39, 44.) At the end of each year, petitioner would prepare a profit and loss statement, the individual income tax returns and the partnership returns of income. (R. 18, 19, 39, 79, 85.)

The investigation began late in 1952, when petitioner was first interviewed by an internal revenue agent. (R. 25, 31.) Examination of the partnership books disclosed substantial discrepancies between them and the partnership returns. The most striking difference appeared in "Selling Expenses", to which approximately $51,000 of drawings of the partners had been charged in each of the two years. This account was shown on the books as totaling $53,487.03

in 1950 and $54,867.37 in 1951, although only $1,952.73 and $3,037.81 were claimed on the respective partnership returns. (R. 20, 21–24, 31–32, 34.)[1] On the other hand, the amount charged to "Purchases" on the returns was overstated by $21,000 in 1950 and $22,000 in 1951, and the amount charged to "Payroll to Employees" on the returns was overstated by $2,712.60 in 1950 and $3,029.06 in 1951. (R. 19, 26, 27, 38, 77, 83.) When the Treasury agents asked petitioner for the work papers he had used in the preparation of the returns, petitioner stated that he had either destroyed or mislaid them (though he produced what purported to be those same work papers at the trial). (R. 32, 39, 44.). When the agents asked whether petitioner could reconcile the returns with the books, he said he could not. (R. 32.) Petitioner advised them that, whenever the partnership bank account would become "swollen", $10,000 would be withdrawn and divided among the partners. (R. 28–29.) When the agents inquired as to the reason for the discrepancies between the books and returns on the item of "Purchases", petitioner gave the false explanation that a substantial part of the difference represented cash purchases of stone which he had made from "wildcat" dealers whose names he did not know. He gave this explanation in November, 1952, and again in January, 1953. (R. 27–28, 35.) In February,

[1] The bookkeeper charged the partners' withdrawal to "Selling Expenses" under instructions from petitioner. (R. 24.) Whenever the bookkeeper had doubts as to how to charge a cash disbursement item in the books he would consult with petitioner. (R. 19.)

1953, however, petitioner retracted this story and stated that it was not true. (R. 28, 35.)

Petitioner, testifying in his own behalf at the trial, admitted that he "did originally give [the agents] this story about the wildcat purchases and then found that it wasn't right." (R. 45.) He testified that he had tendered a check for $40,000 to the Government in 1955 in payment of back income taxes for himself and his partners for the years 1947 through 1951 (R. 42, 45); that he had never intended to defraud the Government of any taxes (R. 43); that he had been under the impression that the partners were entitled to withdraw "fees" from the business without paying income tax on them (R. 46, 47); and that the overstatement of the "Purchases" account on the returns embodied these "fees" (R. 46).

ARGUMENT

1. Although petitioner frames his first question (Pet. 7–9) in terms of whether the court below erred in refusing to review the sufficiency of the evidence in the absence of a motion for acquittal at the close of all the evidence, it is clear that this case presents no such question. There was undoubtedly a substantial understatement of net income on each of the returns, and petitioner concedes (Pet. 5) that the only issue the jury was called upon to decide was that of willfulness. With respect to that element of the proof, the Court of Appeals stated (Pet. 25):

> In the instant case, while the question of the sufficiency of the evidence to sustain the verdict is not properly presented, we have examined

> the record with great care and think there is abundant evidence warranting the jury in finding specific intent to defeat the tax on the unreported income.

It is clear that the court was correct. The jury could readily have inferred willfulness from the size and consistency of the understatements of income, resulting from the systematic falsification of the books and tax returns by petitioner, and from his initial explanation to the investigating agents, later admitted to have been false, that the excessive deductions for "Purchases" represented transactions with "wildcat" dealers. (*Supra*, pp. 5–6.) Moreover, the defense advanced by petitioner at the trial was plainly incredible. If he had acted in the honest though mistaken belief that the partners were entitled to draw "fees" without paying income tax on them, he would hardly have disguised over $20,000 per year of such withdrawals on the returns as "Purchases". (*Supra*, pp. 5, 6.) We submit that the evidence of guilt was indeed "abundant", as the court below found, and that there is no conflict with *United States* v. *Safur*, 251 F. 2d 30 (C. A. 7th), which merely holds that there may be circumstances under which insufficiency of proof may amount to plain error under Rule 52 (b) of the Federal Rules of Criminal Procedure, and hence be reviewable even in the absence of a timely motion for acquittal.

2. Petitioner contends (Pet. 9–17) that the trial court committed reversible error in instructing the jury on the issue of willfulness. The argument is

without substance. The portion of the instruction complained of is as follows (R. 56):

> The presumption is that a person intends the natural consequences of his act, and the natural presumption would be that if a person knowingly or intentionally did not report all of his income and thereby the government was cheated or defrauded of taxes, that he intended to defeat the tax on the unreported income.

In the first place, the point has not been preserved. No objection was made at the trial, as required by Rule 30 of the Federal Rules of Criminal Procedure,[2] nor was the point raised in petitioner's motion for a new trial. (R. 69–70.) Not having called the alleged error to the attention of the trial court, petitioner is in no position to complain on appeal. *Johnson* v. *United States*, 318 U. S. 189, 200–201; *Wong Tai* v. *United States*, 273 U. S. 77, 83; *Boyd* v. *United States*, 271 U. S. 104, 107–108. Second, petitioner is taking a single sentence from the context of a long instruction; but the sentence must be read in the light of the charge as a whole. *Herzog* v. *United States*, 235 F. 2d 664, 667 (C. A. 9th), certiorari denied, 352 U. S. 844. So read, it is seen to be innocuous; the jury could not

[2] "* * * No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

have been misled into believing that a presumption could take the place of solid proof of willfulness.[3]

There is no conflict between the instant case and those relied upon by petitioner (Pet. 6, 9–10, 12, 13): *Morissette* v. *United States*, 342 U. S. 246; and *Bloch* v. *United States*, 221 F. 2d 786 (C. A. 9th), rehearing denied, 223 F. 2d 297. In *Morissette*, the trial judge removed from the jury's consideration the issue of felonious intent, refusing to permit defense counsel to argue that the defendant had acted with innocent

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[3] The trial court charged the jury, *inter alia*, as follows:

> "Fraud," within the meaning of the indictment here returned, means actual, intentional wrongdoing, and the intent required is the specific purpose to evade a tax believed to be owing, and mere negligence or carelessness, whether slight or great, is not equivalent or sufficient. Fraud is never imputed or presumed and you may not find the defendant guilty upon circumstances, if any, which create only suspicion. [R. 55.]
>
> * * * * *
>
> You are instructed that the mere filing of a false or fraudulent income tax return, or the willful failure to pay an income tax due, are not of themselves sufficient to constitute an offense under this indictment; that * * * it is incumbent upon the government [to] * * * prove beyond a reasonable doubt that the defendant committed some willful and fraudulent act or acts, the likely effect of which would be to mislead or conceal from the taxing officers the amount of income upon which the tax is levied * * *. [R. 58.]
>
> * * * * *
>
> So, when intent is sought to be shown by the actions of the person in question, and the surrounding circumstances, there must be proof of facts by or from which the specific intent can be inferred and determined with certainty—that is, such proof of intent must establish this element of the charge beyond a reasonable doubt. [R. 61.]

intent, and deciding the question of intent "as a presumption of law, apparently conclusive." (342 U. S. at 249, 273–274.) In the *Bloch* case, the Ninth Circuit reversed a conviction partly because of an instruction similar to that complained of here, but also because of (1) other instructions on willfulness held to have been erroneous; and (2) misconduct of the prosecutor. The *Bloch* case, insofar as it might have been deemed comparable to the situation presented in the case at bar, must be considered in light of the later decision of *Herzog* v. *United States, supra,* decided by nine judges of the Ninth Circuit sitting *en banc.* After fully discussing the *Bloch* case, in which there was no discussion of the effect of the court's instructions as a whole, the court stated (235 F. 2d 667):

> In determining whether the giving or the failure to give an instruction warrants a reversal, the courts are not to consider the instruction in isolation. They are obliged to examine the charge as a whole in light of the factual situation disclosed by the record. * * *

The court below, consistent with the *Herzog* case, followed the Ninth Circuit rule and held, correctly we submit, that "the instructions taken as a whole clearly required the jury to find specific intent to defeat the tax on the unreported income." (Pet. 26.)

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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